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Taxation

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TAXATION

Jurisdiction

During the past year several Ohio Supreme Court decisions presented variations of the century-old problem of state taxation of the instrumentalities of the United States Government, which is controlled fundamentally by the historic decision in *McCulloch v. Maryland*.¹

Under the Ohio Revised Code all money, credit, deposits and other property of persons residing in Ohio are subject to taxation generally.² The Code also authorizes the assessment and taxation of all shares of stock in a financial institution located in Ohio whether or not the capital is divided into shares held by the owners or even if no capital stock has been issued.³ The book valuation of the stock is assessed in the name of the financial institution.⁴

Three supreme court decisions were concerned with a common problem namely, whether the value of federal securities held as part of the assets of a financial institution should be included in the determination of the assessment of the shareholders' interests.

The first case⁵ considered this problem in the light of whether the legislature intended to exclude from the assets of a taxable financial institution, as defined by the Revised Code,⁶ the valuation attributable to such securities held by the financial institution. It was held therein that the General Assembly did not intend to exclude them, thereby subjecting the interests of shareholders to assessment at book value without any diminution for that proportion attributable to federal securities.

Such a ruling is in line with an early supreme court decision⁷ which held that the State in assessing shares of capital stock need not deduct the value of United States bonds owned and held by a corporation from the total corporate resources in order to ascertain the value of each share. The Supreme Court of the United States in affirming this early decision, noted that there is a distinction between the property of the corporation repre-

¹ 4 Wheat. (17 U.S.) 316 (1819).

² OHIO REV. CODE § 5709.02. Such property is subject to taxation at the appropriate rates set forth in Ohio Revised Code Sections 5707.03, 5707.04.

³ OHIO REV. CODE § 5725.04.

⁴ OHIO REV. CODE § 5725.07.

⁵ *Broadview Savings and Loan Co. v. Peck*, 161 Ohio St. 119, 118 N.E.2d 665 (1954).

⁶ OHIO REV. CODE §§ 5725.04 (as to shares) and 5725.03 (as to deposits), at the rates specified in sections 5707.03, .04.

⁷ *Cleveland Trust Co. v. Lander*, 62 Ohio St. 266, 56 N.E. 1036 (1900)

sented by its capital stock and the property of the shareholders represented by their shares.⁸

The second case⁹ construed the phraseology "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock"¹⁰ as referring to the capital of and belonging to the owners which was employed in the institution. It was the opinion of the majority of the supreme court that the value of federal securities held by a financial institution need not be deducted in ascertaining the valuation of the ownership interests of the depositors in a financial institution for intangible tax purposes under the Revised Code.¹¹

The third case was concerned with taxation of withdrawable shares as deposits and on the capital employed, or the property representing it in a federally incorporated savings and loan association.¹² The supreme court adhered to its stated position in the *Society for Savings*¹³ case discussed above, in holding the share and capital employed taxable at their aggregate value without diminution by the value of federal securities held by the financial institution. The court also rejected an argument that the appellant's shares were exempt from taxation as constituting an instrumentality of the federal government and also the argument that the same rule must be applied to taxation of shares of incorporated institutions as is applied to the taxation of the owners of an unincorporated financial institution.¹⁴

While not so designating it, a supreme court decision was concerned fundamentally with the constitutional limits of taxation under the sales tax.

⁸ *Cleveland Trust Co. v. Lander*, 184 U.S. 111, 22 Sup. Ct. 394 (1902).

⁹ *Society for Savings v. Peck*, 161 Ohio St. 122, 118 N.E.2d 651 (1954); *probable jurisdiction noted*, 75 Sup. Ct. 49 (1954)

¹⁰ OHIO REV. CODE § 5725.04.

¹¹ The majority of the court was not impressed with the argument that the tax was not upon the ownership of capital invested in a financial institution based upon the want of statutory provision for the corporation which is required to pay the tax, passing it on to those whose property interests are taxed.

The gist of the majority position is that it is ownership interests of the depositors in the corporation, and not any capital or property of or belonging to the corporation, which are the properties to be taxed pursuant to the Ohio Revised Code Section 5725.04, assessed pursuant to Section 5725.07, and taxes at the two-mill rates specified in Section 5707.03 (D)

Judge Stewart agreed with the court's position as to the taxation of "shares" but dissented vigorously from the majority position on the taxation of capital employed, or property representing it, valuing such interest without deducting therefrom any federal securities contained therein.

¹² *First Federal Savings & Loan Ass'n. v. Peck*, 161 Ohio St. 149, 118 N.E.2d 667 (1954); *probable jurisdiction noted*, 75 Sup. Ct. 49 (1954).

¹³ 161 Ohio St. 122, 118 N.E.2d 651 (1954).

¹⁴ Judge Stewart again dissented on the issue of "capital employed."

It was held that motor vehicles purchased outside of Ohio for use outside of the State where the Ohio vendor received the vehicles in Ohio solely for the purpose of sale to the out-of-state vendee and where each step in the transaction disclosed that purpose, were not subject to the Ohio sales tax.¹⁵

Another supreme court decision was concerned with the fact of doing business within a municipality sufficient to render the businessman subject to the licensing authority of the municipality.¹⁶ The City of Cincinnati was not allowed to apply its licensing authority to a taxi operator who operated cabs physically from a point without Cincinnati, hauling passengers from its regular place of business into the city, but accepting no business or passengers within its limits. The taxi operator was not subject to Cincinnati's licensing authority merely because of the fact that he maintained a telephone in Cincinnati from which calls were relayed to its place of business beyond the city limits.

Exemptions

The General Assembly has exempted¹⁷ from taxation public property used exclusively for a public purpose under the power visited in it by Article XII, Section 2 of the Ohio Constitution. One supreme court decision denied such exemption when property was leased on a non-profit basis to a non-profit corporation for the purpose of promoting public entertainment, staging of public and private events, and the leasing to others of concession privileges. To exempt public property there must be ownership and a dedication to an exclusively public purpose.¹⁸

General Property

The reported cases in this area dealt with real property exemptions and the redemption of forfeited lands. In *Welfare Federation of Cleveland v. Peck*¹⁹ the supreme court had before it a question of the split-listing of a

¹⁵ *Kelly Motors, Inc. v. Peck*, 161 Ohio St. 186, 118 N.E.2d 408 (1954).

The relevant Revised Code Sections are 5739.02 and 4505.06. The former does not directly describe the factual situation, but by citing it the Court must have had reference to the exemptions portions (B) (11) "Sales not within the taxing power of this state under the Constitution of the United States." This is also indicated by the following quotation from the Court's opinion: "Too much of this transaction occurred outside this state to hold that the purchase was completed in Ohio."

The other Section, 4505.06, is more explicit, requiring the clerk of courts to issue a certificate of title without payment of tax or evidence of payment "(E) When the motor vehicle was purchased outside of this state for use outside this state."

¹⁶ *Marionmont Taxi, Inc. v. Cincinnati*, 162 Ohio St. 163, 122 N.E.2d 400 (1954).

¹⁷ OHIO REV. CODE § 5709.08.

¹⁸ *Board of Park Com'rs. v. Board of Tax Appeals*, 160 Ohio St. 451, 116 N.E.2d 725 (1954).

¹⁹ 160 Ohio St. 509, 117 N.E.2d 1 (1954).

building having a single ownership for purposes of tax exemption. It appeared that nine floors of an eleven story building were used exclusively for charitable purposes. Applying the "separate entity" concept of the Revised Code,²⁰ the supreme court held that the separation could be effected on a horizontal plane separating the two lower floors from the remainder which was being used exclusively for charitable purposes. This decision is a natural extension of the position of the court in the recent case of *Trustees of the Church of God v. Board of Tax Appeals*.²¹

The two cases concerning forfeited lands dealt with problems of the amount of payments for redemption and the proper parties to claim redemption. The Revised Code Provision authorizing redemption of forfeited lands at any time before disposition by the State, requires payment of all the taxes, assessments, penalties and interest due thereon at the time of payment.²² As applied to a delinquency which began before 1936, the court was concerned with whether this section applied exclusively or whether Revised Code Section 323.42 which defines the maximum amount which shall be tendered in redemption, fixes the maximum which may be required by the county treasurer. The court held that a tender of a sum equal to 100 per cent of the principal sum of taxes and assessments, less penalties, interest, and other charges for 1936 and prior years, plus penalties, interest and other charges for 1937 and all years subsequent, to the year of payment, is sufficient.²³ The court applied the Code section cited above as controlling the maximum amount.

In the second case the court held that a mortgagee does not qualify as a "former owner" within the meaning of the redemption statute.²⁴ The mortgagee must obtain the property in foreclosure proceedings or otherwise extinguish the right of the mortgagor to redeem or obtain possession by ejectment after the condition is broken in order to qualify as "a former owner" within the meaning of the statute.²⁵

Tangible Personal Property

The reported cases were concerned with property and persons subject to the tax and with certain questions relative to the valuation of tangible personal property.

In 1948 and 1949, the B. F. Goodrich Company, a New York corporation authorized to do business in Ohio, did not return tangible personal

²⁰ OHIO REV. CODE § 5713.04.

²¹ 159 Ohio St. 517, 112 N.E.2d 633 (1953).

²² OHIO REV. CODE § 5723.03.

²³ State *ex rel.* Fodor v. Monroe, 160 Ohio St. 495, 117 N.E.2d 11 (1954).

²⁴ Levin v. Carney, 161 Ohio St. 513, 120 N.E.2d 92 (1954).

²⁵ OHIO REV. CODE § 5723.03. The opinion of the court describes the situation

property, including tire cord material, which was stored in an Ohio warehouse operated by the company. The company acted in reliance upon a Code section which excluded property, not used in business in Ohio, by a non-resident if held in a storage warehouse in Ohio for storage only. The tax commissioner included this property as personal property of the appellee subject to taxation. The supreme court affirmed the reversal by the Board of Tax Appeals of the commissioner's ruling.²⁶ First, pointing out that the taxpayer is entitled to have any ambiguity in the taxing statute resolved in his favor, the court decided that a corporation incorporated under the laws of a foreign state will be included within the word "non-resident" in the taxing statute; and, second that property held for storage only is nevertheless within the exclusion²⁷ even though its owner intended at some later time to sell it or use it as manufacturing material.

A second case²⁸ dealt with the statutory definition of tangible personal property which expressly excluded patterns, jigs, dies and drawings from the things included therein.²⁹ The tax commissioner contended that the mentioned items were includable as elements of valuation of the manufacturing inventory for personal property tax purposes, but the court held that the language of the statute is unambiguous, and that the items are to be excluded for every purpose of personal property taxation.

What attachments to a motor vehicle are subject to the tangible personal property tax? This question was presented by a taxicab operator which had installed meters and two-way radios in its motor vehicles. The answer to this question involves a construction of the code section which exempts motor vehicles from the tangible personal property tax.³⁰ A majority of the supreme court held that articles added to a motor vehicle for the purpose of facilitating the operation of a taxicab business are not integral parts of the vehicles and are therefore not exempt from the personal property tax.³¹

Two supreme court decisions presented interesting question of the valuation of personal property. In the *Willard Storage Battery* case,³² the

generally as follows: "It must, therefore, be held under Section 5746, General Code (Section 5723.03, Revised Code) that the term, 'former owner or owners, does not include a mortgagee of mortgaged property where the mortgagor has not been divested of his fee by legal proceedings."

²⁶ *B. F. Goodrich Co. v. Peck*, 161 Ohio St. 202, 118 N.E.2d 525 (1954)

²⁷ OHIO REV. CODE § 5701.08.

²⁸ *Goodyear Aircraft Corp v. Peck*, 162 Ohio St. 200, 122 N.E.2d 700 (1954)

²⁹ OHIO REV. CODE § 5701.03.

³⁰ Exemption of motor vehicles from personal property tax is provided by Ohio Revised Code Section 5701.03 and 4503.04.

³¹ *Taxicabs of Cincinnati, Inc., v. Peck*, 161 Ohio St. 508, 120 N.E.2d 86 (1954).

³² *Willard Storage Battery Co. v. Peck*, 161 Ohio St., 197, 118 N.E.2d 514 (1954).

taxpayer had valued its lead inventory at cost rather than market value on its monthly valuations of inventory under the Code.³³ The taxpayer insisted, however, that the price of lead had increased out of proportion to the general commodity price level increase in a comparable period of time, and that its actual cost should be reduced on a formula basis. The taxing authority refused a reduction but accepted the inventory valuation returned by the taxpayer without considering the actual market value of lead on the various valuation dates. The court rejected the taxpayer's request for a proportionate valuation, pointing out that under the statute actual market price is the best evidence of true value, and ordered the taxing authorities to take into consideration current market prices in determining the true value of the lead inventory.

The other valuation case³⁴ dealt with the application of a published directive of the Department of Taxation providing for a straight-line depreciation percentage to be applied to the original cost of personal property in determining the true value of personal property used in certain industries. The Department of Taxation took the position that its directive must be applied regardless of any evidence as to the actual life of industrial equipment. While agreeing with the use of the directive in the ascertainment of true value, the court held that the taxing authority is required to ascertain from the evidence whether in a particular case the application of the directive will produce an unreasonable result. Such directives establishing depreciation rates are *prima facie* authority only and they are subject to adjustment in all cases where special or unusual circumstances or conditions of use are shown to exist. All relevant evidence bearing upon actual depreciation must therefore be received and weighted by the valuing authority.

Intangible Personal Property

Several of the supreme court decisions under the Ohio intangible personal property tax were concerned with the proper classification of a particular item of property. While the Revised Code defines royalties received from patents as investments,³⁵ not all payments flowing from contracts concerning patents are royalties subject to the intangibles tax.³⁶ In *Taylor v. Peck*³⁷ the court held that annual payments of a percentage of the net corporate sales to a patent owner during his lifetime in return for the assignment of such patents were not income from royalties or invest-

³³ OHIO REV. CODE §§ 5711.18 and 5711.22.

³⁴ *W. L. Harper Co. v. Peck*, 161 Ohio St. 300, 118 N.E.2d 643 (1954).

³⁵ OHIO REV. CODE § 5701.06 (C).

³⁶ OHIO REV. CODE § 5707.04 (A).

³⁷ 160 Ohio St. 288, 116 N.E.2d 417 (1953).

ments but rather consideration for the transfer of a capital investment. Investments include evidences of indebtedness, whether negotiable or not,³⁸ but not all income produced pursuant to contract is deemed to flow from an investment. Thus, "investments" do not include a lease of tangible personal property under which the lessor received rental or other compensation, and the lessor of trolley coaches which receives lease income from the lessee under a written contract is not required to make an intangible tax return of the lease or of the rental income received thereunder.³⁹

"Accounts receivable" and "accounts payable"⁴⁰ are important terms under the intangibles tax. One supreme court decision considers the status of renegotiation refunds due from a contractor to the United States. In *Eastern Machinery Co. v. Peck*,⁴¹ the court ruled that such refunds demanded from the contractor-taxpayer were "accounts payable" for determining tax credit even though there was an appeal pending from the administrative determination. But, accounts owing a contractor by a federal department which are seized under United States statutes and applied as payment on a renegotiation refund due on a separate contract are not "accounts receivable" or "taxable intangibles" under the Revised Code.⁴²

In an interesting case concerning the tax consequences of a 100% stock split at the very end of the year, the tax commissioner had treated the additional shares received by the taxpayer without additional consideration as non-income producing investments.⁴³ The court, pointing out that the tax is based on the value of the investment in stock and that the taxpayer's investment after the split was no different from that before the issuance of the new shares, held that the income yield for tax purposes for the year of the split was produced by the entire issue of stock, that is, all of the stock held after the split was non-income producing.⁴⁴

Are amounts held on tax day by a bank to redeem certified checks taxable as deposits under the Code?⁴⁵ After certification, the drawer of the check does not have the amount covered by the check on deposit since the amount represented by the check is no longer a "deposit." Nor does the mere holder of the certified check become a "depositor" by virtue of the accept-

³⁸ OHIO REV. CODE § 5701.06 (B).

³⁹ *Columbus & Southern Ohio Electric Co. v. Peck*, 161 Ohio St. 73, 118 N.E.2d 142 (1954).

⁴⁰ OHIO REV. CODE § 5701.07

⁴¹ 161 Ohio St. 1, 117 N.E.2d 593 (1954).

⁴² OHIO REV. CODE § 5701.07 (accounts receivable); OHIO REV. CODE § 5701.09 (taxable intangibles).

⁴³ OHIO REV. CODE § 5711.22.

⁴⁴ *Marsh v. Peck*, 162 Ohio St. 11, 120 N.E.2d 428 (1954).

⁴⁵ OHIO REV. CODE § 5701.05.

ance of the certified check. The supreme court⁴⁶ held that these amounts set aside to pay certified checks are not taxable deposits and are not includable in the bank's report of taxable deposits.⁴⁷

Sales and Use Taxes

As previously pointed out in this article,⁴⁸ the supreme court held that the Ohio sales tax did not apply to motor vehicles purchased outside of Ohio for use outside of the state even though the vehicles were physically moved through Ohio and Ohio title certificates were obtained.⁴⁹

A considerable number of decisions dealt with the problem of non-retail sales. Technically, these issues arise from attempts to apply the statutory concept of a "retail sale" to specific factual situations. The Revised Code excludes from the definition of "covered sales" certain personal property transferred for the purposes of use or consumption in the production of tangible personal property for sale, and property used directly in the making of retail sales or directly in the rendition of a public-utility service.⁵⁰

Thus drilling and blasting equipment used by a contractor for the purpose of loosening and breaking up mineral material subsequently offered for sale was considered used in the production of tangible personal property, although the property in question was not owned or sold by the consumer-blasting contractor.⁵¹ On the other hand, trucks used by a mine operator in removing slag and other non-marketable materials from the scene were not used directly in the production of tangible personal property, and were therefore taxable.⁵² Materials used or consumed by a railroad in the construction of a required passenger station and its appurtenances were not

⁴⁶ First National Bank of Cincinnati v. Peck, 162 Ohio St. 64, 120 N.E.2d 725 (1954).

⁴⁷ The report is required by Ohio Revised Code, Section 5725.02, and the tax is prescribed by Sections 5709.02 and 5707.03.

⁴⁸ See the section on JURISDICTION, *supra*.

⁴⁹ Kelly Motors, Inc. v. Peck, 161 Ohio St. 186, 118 N.E.2d 408 (1954).

⁵⁰ OHIO REV. CODE § 5739.01 (E) (2).

⁵¹ Apex Power Corp. v. Peck, 162 Ohio St. 189, 122 N.E.2d 693 (1954).

⁵² Powhatan Mining Co. v. Peck, 160 Ohio St. 389, 116 N.E.2d 426 (1953). Judge Middleton dissented from the decision. His opinion expresses the view that the court has been considering the manufacturing process as terminated too soon. He felt that the removal of the finished article from the end of the production line was imperative and that equipment used in the process is used directly in the production of tangible personal property by manufacturing. He also felt in the instant case that the trucks used exclusively in the removal of the "gob" or waste materials of the ultimate mining process were definitely used in the manufacturing operation.

"sold at retail" within the meaning of the statute excluding sales of goods used directly in the rendition of a public-utility service.⁵³

The Revised Code⁵⁴ defines a "sale" as including a construction contract providing for the incorporation of tangible personal property into a structure or improvement on and becoming a part of real property whenever the consideration for such incorporation is charged or paid separately from the consideration for the performance of the other obligations of the construction contract. The supreme court held that an incorporation agreement which does not call for a separate charge is not a sale within the meaning of the statute, and therefore the contractor-purchaser of property is a consumer within the meaning of the statute, and is taxable.⁵⁵

The Code outlines the relative liabilities of the vendor and consumer in the collection and payment of the sales tax, imposing the legal duty of collecting the sales tax and liability of failure to collect it on the vendor.⁵⁶ The consumer becomes personally liable for the amount only in case of a refusal to pay the vendor, a refusal to sign and present the vendor a proper exemption certificate, or, if after presenting such a certificate, he uses the property so as to destroy the qualifying exemption. Thus, where the record failed to show any request or demand for payment by the vendor or any refusal to sign or present an exemption certificate but showed the payment of all taxes demanded by the vendor, an assessment under the sales tax was invalid.⁵⁷ However, under the use tax,⁵⁸ the burden of paying the tax is upon the one storing or consuming the property, and he is directly liable for such tax without any assessment on the vendor.⁵⁹

The sales tax statute⁶⁰ contemplates that the consumer will furnish to the vendor a certificate of exemption. A practical question arises concerning the time at which this certificate must be presented in order to avoid the transaction becoming taxable and the consumer liable for the tax. The supreme court held that a consumer who supplied the certificates at the time of payment of invoices submitted to him by the vendor did not refuse to furnish the certificates and was not therefore liable for the tax.⁶¹

⁵³ *Erie R. Co. v. Peck*, 160 Ohio St. 322, 116 N.E.2d 304 (1953).

⁵⁴ OHIO REV. CODE § 5731.01 (B).

⁵⁵ *Ornamental Iron Work Co. v. Peck*, 160 Ohio St. 399, 116 N.E.2d 577 (1953).

⁵⁶ OHIO REV. CODE § 5739.13.

⁵⁷ *Mannen & Roth Co. v. Peck*, 161 Ohio St. 153, 118 N.E.2d 134 (1954).

⁵⁸ Ohio Revised Code Section 5741.13, requires a person storing, using or consuming tangible personal property, subject to the tax, when it is not paid to the seller, to file a quarterly return showing the price paid, and the tax accruing on such purchases must be paid by the person making the return.

⁵⁹ *Mannen & Roth Co. v. Peck*, 161 Ohio St. 153, 118 N.E.2d 134 (1954).

⁶⁰ OHIO REV. CODE § 5739.03 (B).

⁶¹ *Shafer v. Peck*, 160 Ohio St. 543, 117 N.E.2d 438 (1954).

Two other decisions dealt with special problems of procedure in sales tax administration. In *Clayton v. Peck*⁶² the tax commissioner, after examining cash register tapes, made a sales tax deficiency assessment against the taxpayer, allowing for a percentage of exempt sales as shown by his examination of the register tapes. His assessment was not held to be unlawful in the absence of substantial affirmative proof by the taxpayer that his allocation was unreasonable. The taxpayer had failed to keep records of sales under 41 cents and failed to present his own analysis of register tape data in support of his contention.

The other case held that a party who recovers a refund of sales taxes illegally or erroneously paid by him is not entitled to recover interest on the amount of such refund.⁶³ The statute is silent on the matter of interest.⁶⁴ In following the majority view in this country on the matter of interest on tax refunds, the court preferred to base its decision upon the fact that the sole basis for recovery of the refund is the statute, and since the state makes no provision for the payment of interest, the taxpayer is entitled to none.

Inheritance Taxation

The Revised Code⁶⁵ levies a tax upon the succession to property by deed, made without a valuable consideration substantially equivalent in money or money's worth to the full value of the property, where it is intended to take effect in possession or enjoyment at or after the death of the grantor. A gift by deed of real property, with the grantor reserving a life estate therein, is such a taxable succession.⁶⁶ The ruling court points out that the vesting of legal title is not the significant thing; the question is whether the grantees did in fact have the right to possess the property. They could neither enjoy nor possess until the grantor's death; and so the gift was "intended to take effect in possession or enjoyment at or after such death."

A court of appeals had reversed a probate court⁶⁷ which had held that one excepting to the inclusion for estate tax purposes property transferred two years before the grantor's death without consideration must prove by a preponderance of the evidence that the transfer was not made in contemplation of death. The supreme court reversed the court of appeals,⁶⁸ con-

⁶² *Clayton v. Peck*, 161 Ohio St. 245, 118 N.E.2d 540 (1954).

⁶³ *State ex rel. Cleveland Concession Co. v. Peck*, 161 Ohio St. 31, 117 N.E.2d 429 (1954).

⁶⁴ OHIO REV. CODE § 5739.07

⁶⁵ OHIO REV. CODE § 5731.02 (C) (2)

⁶⁶ *In re Sharp's Estate*, 120 N.E.2d 511 (Clinton Prob. Ct. 1954).

⁶⁷ OHIO REV. CODE § 5731.04.

⁶⁸ *In re Walker's Estate*, 161 Ohio St. 564, 120 N.E. 2d 432 (1954)

struing the statutory phraseology — “unless shown to the contrary” — as casting the burden of proof upon the one contending that the transfer was not in contemplation of death.

The inheritance tax statute provides the highest rate of taxation to which any given succession is susceptible, such rate being expressed in terms of the highest rate which would be possible upon the happening of the remotest contingency or condition.⁶⁹ In applying this statute to a succession through a will which provided a gift over to the “heirs of the body of the nieces and nephews if said nieces and nephews should die prior to the death of said son, leaving heirs of the body surviving,” a court of appeals⁷⁰ determined that this phraseology created such a possibility or contingency thereby subjecting the succession to the highest rate imposed by the inheritance tax law.⁷¹

The Code exempts⁷² from the succession tax gifts to or for the use of an institution which are to be used for public charity carried on in whole or in a substantial part within Ohio. In the *Ogelbay's Trust* case⁷³ the supreme court determined that a bequest of the residue of an estate in trust for public charitable or educational uses and purposes is a gift to “an institution” for purposes of the exemption statute. Under this trust agreement there was an overriding geographical limitation on the use of the trust funds, with at least 50 per cent required to be used for public charitable and educational activities within Ohio and not more than 50 per cent for public charitable purposes in West Virginia. It was held, first, that these limitations did not create two trust estates, and, second, that such a gift was wholly exempt as being carried on “in substantial part within this state.”

The question of the liability of property included in the marital deduction provided in the federal estate tax⁷⁴ for the payment of the federal estate tax had an interesting history. In *Miller v. Hammond*⁷⁵ the first Ohio decision, after the creation of the marital deduction by Congress, the Supreme Court of Ohio held that the portion of a testator's estate which the surviving spouse took under the statute of descent and distribution after election not to take under the will, should not be reduced by the deduction therefrom of federal estate taxes which did not directly result from the passing of the estate to the surviving spouse. Since the widow was entitled to but one-third of the decedent's estate, this was less than the maximum

⁶⁹ OHIO REV. CODE § 5731.28.

⁷⁰ *In re Estate of Coyle* 122 N.E.2d 115 (Ohio App. 1954).

⁷¹ OHIO REV. CODE § 5331.12 (C).

⁷² OHIO REV. CODE § 5731.09.

⁷³ 162 Ohio St. 1, 120 N.E.2d 437 (1954).

⁷⁴ INT. REV. CODE § 2056 (1954).

⁷⁵ 156 Ohio St. 475, 104 N.E.2d 9 (1952).

marital deduction allowable, and therefore there was no federal estate tax deductible. This holding resulted in elevating the "marital deduction" to the status of an "exemption."

This was the status of the law until the recent decision of the supreme court in *Campbell v. Lloyd*.⁷⁶ In overruling *Miller v. Hammond* on its basic "exemption" theory the court reexamined the pertinent statutes governing the distribution of decedents' estates, and reverted to its former position,⁷⁷ that, in determining the value of the succession of any beneficiary, the amount of the federal estate tax should first be deducted, like other debts and expenses of administration. Thus, a widow electing to take under the statute of descent and distribution takes subject to federal estate tax, and the amount she will take will be computed after the deduction of the federal estate tax.

The above decisions were concerned with the situation of a spouse taking against a will. The probate judge who originally decided the *Miller v. Hammond* case having been reversed by *Campbell v. Lloyd* at the time of his decision, was called upon to decide the question of the liability of the widow's share for payment of federal estate taxes where she took *under* the will.⁷⁸ The will contained no provision for the payment of federal estate taxes. Under the will the widow received a specific bequest of a restaurant business, and shared equally with testator's sister in the residue of his estate. There were also some non-probate assets which the widow claimed in her marital deduction. As to these the court felt bound by the *Miller* decision since they were analogized to intestate property. These assets were held to pass free from the burden of the federal estate tax. The burden of these taxes fell upon the residuary estate. The restaurant bequest was also held to pass free from the burden of the federal tax which had to be taken out of the residue. The probate court, however, did not feel bound by the *Miller* case in deciding the liability of the widow's share of the residuary estate. Accordingly, it ruled that the tax must be deducted from the residue before she received her half of the remaining residue. Finally, the sister was required to pay her proportionate share of the federal estate taxes on the non-probate assets received by her (insurance and jointly owned property), applying the rule of equitable apportionment of the federal tax burden between the probate and the non-probate assets, announced in *McDougall v. Central National Bank*.⁷⁹

In view of the reversal of position by the supreme court in *Campbell v.*

⁷⁶ 162 Ohio St. 203, 122 N.E.2d 695 (1954)

⁷⁷ Tax Commission *ex. rel* Price, Atty. Gen'l. v. Lamprecht, 107 Ohio St. 535, 140 N.E.2d 333 (1923)

⁷⁸ Foerster v. Foerster, 122 N.E.2d 314 (Franklin Prob. Ct. 1954)

⁷⁹ 157 Ohio St. 45, 104 N.E.2d 441 (1952).

Lloyd, it would appear that the foregoing probate decision should be modified to conform to the later rule announced by the supreme court as to the liability of intestate property to the federal estate tax.

Finally, the supreme court⁸⁰ has applied the principle of *Campbell v. Lloyd* to the liability of property passing, under provision of a will, to charities. Certain charities were beneficiaries along with noncharitable legatees in the residuary estate of Susan Manning Ball. The court of appeals had held that the charitable legatees should be paid their legacies free of federal estate taxes, leaving the entire burden of the tax to fall upon the noncharitable legatees. The supreme court reversed the judgment of the court of appeals. This left in effect the probate judgment which was that all residuary legatees, including the charities, should bear the burden of the tax.

Unemployment Compensation

Two appeals from the decisions of the Administrator of the Bureau of Unemployment Compensation concerning tax problems were decided. In one case the administrator was upheld in his decision that two partnerships, located in the same building, having the same address, same telephone and same management, engaged in the printing business and having common membership were to be treated as a single employer and given but one rate in determining contributions due.⁸¹ In the other case,⁸² involving a transfer of a major portion of a business prior to the amendment of the law in 1952, the court affirmed the administrator in his holding that the entire business of the transferor must have been acquired before the successor could use the transferor's merit rating for the payment of contributions. The statute now uses this less stringent language: "If an employer acquires substantially all of the assets used in trade of business of another employer. "

Corporate Excise

A recent decision under the Ohio franchise tax on Ohio corporations for profit, held that a fair construction of the applicable Ohio statutes required the inclusion in the total value of a corporation's issued and outstanding shares of stock, of all capital, surplus, undivided profits and reserves without deduction therefrom of the value of any federal securities which might be included therein.⁸³

⁸⁰ *Hall v. Ball*, 162 Ohio St. 299, 123 N.E.2d 259 (1954).

⁸¹ *Church Budget Envelope Co. v. Cornell*, 119 N.E.2d 316 (Franklin Com. Pl. 1954).

⁸² *Apex Smelting Co. v. Cornell*, 121 N.E.2d 571 (Franklin Com. Pl. 1954).

⁸³ OHIO REV. CODE § 4141.24.

City Income Tax

An income tax levied by Cincinnati was charged with retroactivity, discrimination and inequality in a suit to enjoin enforcement of it. In substance the ordinance imposed a tax of one per cent on gross salaries, wages, collections and other compensations earned during the period of April 1, 1954 to October 31, 1954, and one per cent on the net profits of corporations, businesses and professions, earned during the months of April to October inclusive which shall not be less than 7/12 of the net profits of such taxpayer for the entire calendar year 1954. An order was issued restraining the levy and collection from plaintiff.⁸⁴

Tax Procedure

In connection with the authorization⁸⁵ that a written petition for reassessment of sales taxes may be filed in person or by registered mail within 30 days after service of the deficiency assessment, it was held that a petition sent in by registered mail was filed on the date of mailing rather than the date of receipt.⁸⁶

In light of the statute providing for appeals from the determinations of the tax commissioner to the Board of Tax Appeals which requires that the notice of appeal have attached thereto a true copy of the notice sent by the commissioner to the taxpayer of the final determination complained of,⁸⁷ the court of appeals held that a copy of the commissioner's findings is jurisdictional and that the Board could lawfully dismiss an appeal not having the attachment.⁸⁸

It has also been held that a county board of revision was not a proper party to object to an allegedly erroneous decision on valuation by the Board of Tax Appeals, pointing out that the right of appeal is confined to a party prejudiced by the decision, a taxpayer.⁸⁹

The statute providing for an appeal to the Board of Tax Appeals from the tax commissioner requires that the notice of appeal shall specify the errors complained of. A notice of appeal which does not enumerate in definite and specific terms the precise errors claimed, rather using very broad and general language, is insufficient to meet the demands of the statute, and the board may lawfully dismiss such an appeal for want of juris-

⁸⁴ Fifth Third Union Trust Co. v. Peck, 161 Ohio St. 169, 118 N.E.2d 398 (1954).

⁸⁵ Clark v. City of Cincinnati, 121 N.E.2d 834 (Hamilton Com. Pl. 1954).

⁸⁶ OHIO REV. CODE § 5739.13.

⁸⁷ State *ex rel.* Sherrick v. Peck, 118 N.E.2d 688 (Ohio App. 1951)

⁸⁸ OHIO REV. CODE § 5717.02.

⁸⁹ David v. Peck, 161 Ohio St. 80, 118 N.E.2d 146 (1954).